SABIL MULIA (M) SDN BHD

v.

PENGARAH HOSPITAL TENGKU AMPUAN RAHIMAH & ORS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
NIK HASHIM JCA
[CIVIL APPLICATION NO: B-01-70-2004]
23 NOVEMBER 2004

CIVIL PROCEDURE: *Injunction - Injunction against government officer and government bodies - Whether court had jurisdiction to grant - Whether merits of case justified grant*

CIVIL PROCEDURE: *Jurisdiction - Injunction - Injunction against government officer and government bodies - Whether court had jurisdiction to grant - Government Proceedings Act 1956, s. 29*

EQUITY: *Equitable remedies and reliefs - Injunction - Injunction from eviction - Renege on promise to renew contract to operate canteen at hospital premises - Whether there was constructive trust - Whether injunction sought justified - Whether damages adequate remedy*

The appellant operated a canteen at the hospital premises of the 1st respondent on a two-year contract basis. The 1st respondent extended the contract for a further 6 months subject to a review for a further extension provided the appellant overcame the complaints on its quality of service. However, the contract was subsequently awarded to the 4th respondent. The appellant applied for an injunction in the court below from eviction but the judicial commissioner ('JC') refused the application on the grounds of lack of jurisdiction. Hence, this appeal for an urgent injunction against the respondents.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] Section 29 of the Government Proceedings Act 1956 ('the Act') is not an impediment to restraining a private defendant from entering into a transaction with the government *(Government of Malaysia v. Lim Kit Siang)*. Therefore, in the present case, there was no reason why the 4th respondent could not have been restrained from entering into a contract

with the government to run a canteen at the 1st respondent hospital. It followed that the JC fell into error when she held against the appellant on this part of the case. (p 130 a-b)

[2] The effect of current authority is that the courts have jurisdiction to grant interim and permanent injunctions against any servant of the government. Accordingly, there was no jurisdictional bar to the High Court granting the appellant the injunction it sought against the 1st respondent, the director of the hospital in question. (pp 133 h & 134 a)

[3] It has been settled since at least 1978 that s. 29 of the Act does not prohibit the grant of temporary injunctions against the government. In *Tengku Haji Jaafar & Anor v. Government of the State of Pahang,* it was held that s. 29 did not take away the right of the court to grant an interlocutory injunction. This court treated the ratio in that case as having settled the law in *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd*. Although the Federal Court reversed this court's decision in that case, the judgment on this point was approved *sub silentio.* (p 134 c-d)

[4] Section 29 of the Act does not prohibit the grant of temporary injunctions against the government. However, the merits of the present case did not justify the grant of the injunction sought. This was a case of a pure breach of contract. The appellant had no interest whatsoever in the immovable property in which the canteen was situated. All that the appellant had was a purely contractual right to run the canteen at the 1st respondent's premises, nothing more. If the appellant established a breach of contract at the trial of the action then it would be entitled to an award of damages in the ordinary way. Further, the appellant's complains were readily compensated by a monetary award. Since monetary compensation was an adequate remedy, it followed that in accordance with well-settled principles governing equitable discretion, specific relief was inappropriate in the circumstances. (pp 134 f & 135 c-d)

[This court did not approve the High Court in Muniandy v. Majlis Perbandaran Langkawi accepting Salleh Abas LP's view in Government of Malaysia v. Lim Kit Siang as opposed to Edgar Joseph Jr J's view in Tan Suan Choo v. Majlis Perbandaran Pulau Pinang when the latter view was affirmed by this court in Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors. The lower courts were advised to abide by the latter view.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu mengusahakan sebuah kantin di premis responden pertama untuk tempoh dua tahun berasaskan kepada suatu kontrak. Responden pertama kemudian melanjutkan tempoh kontrak selama enam bulan tertakluk kepada kemungkinan dipertimbang untuk lanjutan seterusnya jika perayu dapat mengatasi aduan-aduan mengenai kualiti perkhidmatannya. Kontrak, bagaimanapun, akhirnya diberikan kepada responden keempat. Perayu memohon perintah injunksi di mahkamah di bawah bagi menghalang pengusirannya, tetapi permohonan ditolak oleh pesuruhjaya kehakiman ('PK') atas alasan ketiadaan bidang kuasa. Perayu dengan itu merayu bagi mendapatkan injunksi kecemasan terhadap responden.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Seksyen 29 Akta Prosiding-Prosiding Kerajaan 1956 ('Akta') bukan penghalang bagi menghindar seseorang defendan persendirian dari memasuki suatu transaksi dengan kerajaan *(Government of Malaysia v. Lim Kit Siang)*. Oleh itu, dalam kes semasa, tiada sebab mengapa responden keempat tidak boleh dihalang dari memasuki suatu kontrak dengan kerajaan bagi mengusahakan sebuah kantin di hospital responden pertama. Dengan itu PK tersilap apabila mendapati terhadap perayu dalam perkara ini.

[2] Kesan autoriti semasa adalah bahawa mahkamah mempunyai bidang kuasa untuk membenarkan injunksi interim mahupun injunksi kekal terhadap mana-mana kakitangan kerajaan. Oleh itu, tiada halangan bidang kuasa kepada Mahkamah Tinggi membenarkan injunksi yang dipohon perayu terhadap responden pertama, pengarah hospital tersebut.

[3] Telah diputuskan sejak seawal 1978 lagi bahawa s. 29 Akta tidak melarang sebarang pemberian injunksi sementara terhadap kerajaan. Dalam *Tengku Haji Jaafar & Anor v. Government of the State of Pahang*, ianya diputuskan bahawa s. 29 tidak mengambil hak mahkamah untuk membenarkan injunksi interlokutori. Mahkamah ini menganggap ratio di dalam kes tersebut sebagai telah memantapkan undang-undang yang tertera dalam *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd*. Walaupun Mahkamah Persekutuan telah mengakas keputusan mahkamah ini dalam kes tersebut, penghakiman atas perkara ini telah diperakui *sub silentio*.

[4] Seksyen 29 Akta tidak melarang pemberian injunksi interlokutori terhadap kerajaan. Walaupun begitu, merit kes semasa tidak menjustifikasikan pemberian injunksi yang dipohon. Ini suatu kes jelas pelanggaran kontrak. Perayu tidak mempunyai apa-apa kepentingan dalam harta tak alih di mana kantin tersebut berada. Apa yang perayu ada hanyalah suatu hak kontraktual untuk mengusahakan kantin di premis responden pertama, tidak lebih dari itu. Jika perayu berjaya membuktikan suatu pelanggaran kontrak di perbicaraan guamannya maka ia berhak mendapat gantirugi dengan cara yang biasa. Lagipun, aduan-aduan perayu sudahpun dipampas melalui award kewangan. Oleh kerana pampasan kewangan adalah remedi yang memadai, maka relif spesifik, dalam halkeadaan yang wujud dan berdasarkan prinsip-prinsip mantap yang mengawal budibicara ekuiti, adalah tidak sesuai.

Mahkamah ini tidak memperakui Mahkamah Tinggi dalam Muniandy v. Majlis Perbandaran Langkawi menerimapakai pandangan Salleh Abas KH dalam Government of Malaysia v. Lim Kit Siang bertentangan dengan pandangan Edgar Joseph Jr H dalam Tan Suan Choo v. Majlis Perbandaran Pulau Pinang di mana pandangan terkemudian tersebut telah disahkan oleh mahkamah ini dalam Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors. Mahkamah-mahkamah bawahan adalah dinasihat supaya mematuhi pandangan yang terkemudian.]

Case(s) referred to:

Birmingham Midshire Mortgage Services v. Sabherwal 80 P & CR 256 ***(refd)***
Gillette v. Holt [2000] 2 All ER 289 ***(refd)***
Government of Malaysia v. Lim Kit Siang [1988] 2 MLJ 12 ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***
Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd [2003] 3 CLJ 378 CA ***(refd)***
Lim Kit Siang v. United Engineers (M) Bhd [1988] 1 MLJ 50 ***(refd)***
M v. Home Office [1994] 1 AC 377 ***(refd)***
Martin – Baker Aircraft Co Ltd & Anor v. Canadian Flight Equipment Ltd [1955] 2 QB 556 ***(refd)***
Masjaya Trading Sdn Bhd v. Kedah Cement Sdn Bhd [2004] 4 CLJ 18 CA ***(refd)***
Merricks v. Heatcoat-Amory [1955] Ch 567 ***(refd)***
Muniandy v. Majlis Perbandaran Langkawi [2003] 4 CLJ 123 HC ***(refd)***
Perbadanan Setiausaha Kerajaan Selangor v. Metroway Sdn Bhd [2003] 3 CLJ 339 CA ***(refd)***
Rankin v. Huskisson [1830] 58 ER 6 ***(refd)***
Saonah Bedul v. Pentadbir Tanah dan Daerah Melaka Tengah [1994] 4 CLJ 584 HC ***(foll)***

Smith v. Attorney General of Nova Scotia [2004] NSCA 106 ***(refd)***
Syarikat Bunga Raya Timor Jauh Sdn Bhd & Anor v. Tractors Malaysia Bhd [1980] 2 MLJ 127 ***(refd)***
Tamaki v. Baker [1901] AC 561 ***(refd)***
Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 ***(refd)***
Tengku Hj Jaafar & Anor v. Government of the State of Pahang [1978] 2 MLJ 105
Yaxley v. Gotts [2000] 1 All ER 711 ***(refd)***

Legislation referred to:
Government Proceedings Act 1956, s. 29(2)
Rules of the High Court 1980, O. 53
Specific Relief Act 1950, ss. 50, 51, 54(d)

Crown Act 1989 [Canada], s. 16(2), (4)
Crown Proceedings Act 1948 [UK], s. 21

Other source(s) referred to:
Professor Wade, *Injunctive Relief Against the Crown and Ministers*, (1991) 107 LQR *4*

For the appellant - V Sithambaram (N Rajivan with him); M/s Sitham & Assoc
For the 1st-3rd respondents - Alice Loke Yee Ching (Siti Nur Ikhlas Bustami with her)
For the 4th respondent - Kamalniza Alias; M/s Yazid, Baba & Partners

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

On Wednesday, 6 October the appellant (plaintiff in the court below) moved this court for an urgent injunction against the first and fourth respondents from evicting it from the canteen premises of the first respondent. An injunction in similar terms had been applied for in the court below and had been refused by the judicial commissioner solely on the ground that she had no jurisdiction to grant the injunction. After reading the papers we formed the view that it was in the interests of justice to treat the motion before us as the appeal and we so ordered. We did not have the benefit of a judgment from the learned judicial commissioner. But that did not inconvenience us because the point on which she decided the case is one of pure law. In any event we have jurisdiction to treat an application for a stay or for leave to appeal as the appeal proper and proceed without a written judgment from the High Court in the interests of justice: *Syarikat Bunga Raya Timor Jauh Sdn Bhd & Anor v. Tractors Malaysia Bhd* [1980] 2 MLJ 127; *Perbadanan Setiausaha Kerajaan*

Selangor v. Metroway Sdn Bhd [2003] 3 CLJ 339. The appeal was then fixed for hearing in the list of appeals for the week commencing 11 October 2004. To facilitate the speedy disposal of the appeal we granted the appellant dispensation from complying with the Rules of the Court of Appeal 1994 and directed that it merely file its memorandum of appeal without the accompanying documents. The appeal was heard on 13 October 2004. At the conclusion of arguments for the appellant we found it unnecessary to call upon the respondents for a reply and therefore dismissed the appeal. The reasons for our conclusion are now produced.

The brief facts of this case are as follows. The appellant, a private limited company, carries on the business of a canteen operator. According to the evidence, the appellant operates canteens at several government hospitals. Among these is the first respondent. It is not disputed that the appellant was awarded a two year contract from 11 September 2001 to 10 September 2003 to operate the canteen at the first respondent's premises. The contract in question was never formalised. It was merely evidenced in writing. It had no provision for termination. It was therefore determinable by the giving of reasonable notice. See, *Martin – Baker Aircraft Co Ltd & Anor v. Canadian Flight Equipment Ltd* [1955] 2 QB 556; *Masjaya Trading Sdn Bhd v. Kedah Cement Sdn Bhd* [2004] 4 CLJ 18.

On 9 July 2003, the first respondent's canteen committee met and decided that the appellant's contract would be extended for a further six months subject to a review for a further extension provided that the appellant overcame the complaints that had been received about the quality of its service. By a letter dated 11 September 2003, the first respondent informed the appellant confirming the extension of six months and of the need for the appellant to pull up its socks. The letter also said that the appellant would be granted a further contract of 2 years to operate the canteen if the respondent is satisfied with the appellant's service. At a meeting of the first respondent's canteen committee on 2 December 2003 attended by the appellant's representatives, it was accepted by the Director of the first respondent that the appellant's service had improved and that it had overcome all the complaints levelled against it. The appellant's representatives were assured that the appellant would be awarded a further two year contract. The appellant's case is that in reliance of this assurance of the first respondent the appellant borrowed money which it invested in installing new equipment, refurbishing the premises and hiring additional manpower but that the first respondent had resiled from its assurance by terminating the appellant's contract by its letter of 10 May 2004. The appellant also complains that the first respondent acted in breach of contract by awarding the canteen contract to the 4th respondent.

On the foregoing facts 2 issues present themselves for resolution. First, whether the High Court had jurisdiction to grant the injunction sought. Second, whether the facts entitled the appellant to an injunction in the exercise of the court's discretion. We will deal with each of these in turn.

First, the jurisdictional point. The relevant provision is s. 29 of the Government Proceedings Act 1956 ("the 1956 Act") the relevant part of which reads:

> (1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that:
>
> (a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties
>
> (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

Proviso (a) to the section has been considered in a number of cases. Some judges have interpreted the proviso to impose a complete bar to the grant of any form of injunction, whether temporary or permanent against the Federal or any State Government or its officers, including Ministers. Others have taken the view that the section only bars the grant of a permanent injunction against the Government. Principal among the cases where the former view was expressed is *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12 where Salleh Abas LP took the extreme view that even indirect restraints against the Government were barred by Proviso (a). After setting out the s. 29 he said:

> This means that no injunction could be directly or indirectly issued against the Government or its officers. Similarly, the court has no jurisdiction to grant an injunction against a private litigant if the injunction would have the effect of restraining the Government or its officers from performing their functions. This has been the interpretation which has been placed by the courts in England as well as in this country.

Abdul Hamid CJ (Malaya) did not go as far. He held that s. 29 affords a defence to the government or a servant of the government to a claim for an injunction subject to compliance with the requirements therein stated. The other member of the majority was Hashim Yeop A Sani SCJ who did not deal with s. 29 at all. Both dissenting judges (Seah and Abdoolcader SCJJ) however held that s. 29 did not bar the grant of interim injunctions against the Government or its officers.

Further, a differently constituted Bench of the Supreme Court (Lee Hun Hoe CJ (Borneo), Wan Suleiman and Wan Hamzah SCJJ) in the same case reversed the decision of the High Court at Penang refusing an interim injunction against United Engineers. The oral judgment of a unanimous Supreme Court was reproduced by VC George J (as he then was) in his judgment in *Lim Kit Siang v. United Engineers (M) Bhd* [1988] 1 MLJ 50 as is as follows:

> The learned judge's interpretation of section 29 of the Government Proceedings Ordinance is too wide. Apart from what the statute expressly prohibits, he ruled that the Court cannot grant an injunction against a party having a transaction with the Government as in the present case. That will have the effect, he said, of indirectly prohibiting the Government from signing the agreement. **With respect we are unable to agree with the learned judge's extension of the scope of that section.**
>
> We have considered a number of authorities both English and local as to the question of *locus standi.* We need only say that on the facts of this case the appellant clearly has *locus standi* to bring this suit.
>
> For the purpose of the application we do not consider the question of the lawfulness or otherwise of the contract is relevant at this stage. We therefore allow the appeal. Costs in the cause.
>
> We would grant the Order in terms of prayers (1) and (2) of the said Summons-in-Chambers with liberty to apply to the Court below.
>
> We would order that this suit be heard early before another judge. (emphasis added.)

It is therefore plain that 6 out of 7 judges of the Supreme Court – in the same case – were unanimous that s. 29 does not prevent an injunction being granted against a private defendant from entering into a transaction with the Government. We say "6 out of 7 judges" because Abdul Hamid CJ (Malaya) appears to accept that the interpretation of s. 29 by the earlier Bench (Lee Hun Hoe CJ (Borneo), Wan Suleiman and Wan Hamzah SCJJ) precluded any further agitation of the point although his own view accorded with that of the

Penang High Court. Thus, when all the judgments delivered by their lordships of the Supreme Court in *Government of Malaysia v. Lim Kit Siang* are interpreted, it is clear that that case is authority for the proposition that s. 29 is not an impediment to restraining a private defendant from entering into a transaction with the Government. So, in the present case, there was no reason why the 4th respondent could not have been restrained from entering into a contract with the Government to run a canteen at the 1st respondent hospital. It follows that the learned judicial commissioner fell into error when she held against the appellant on this part of the case.

We now turn to the wider question, namely whether there is jurisdiction in a court to grant an injunction against the Government or its officers. Let us take officers of the Government first.

Since s. 29 finds its origins in s. 21 of the United Kingdom Crown Proceedings Act 1948, the starting point is the position as it stood before 1947. That position is as follows. At common law, a subject could not sue the Crown or its officers. This was based on the feudal maxim "the King can do no wrong". On that basis even prerogative writs could not be issued against the Crown. The only way in which a subject could seek recourse against the Crown or its officers at common law was by a petition of right that was granted at the unfettered discretion of the Sovereign.

By contrast, Courts of Equity always – even before 1947 – exercised jurisdiction to grant injunctions against Ministers and officials empowered in their own names. See, *Rankin v. Huskisson* [1830] 58 ER 6; *Tamaki v. Baker* [1901] AC 561. In the last mentioned case, the Judicial Committee of the Privy Council issued an interim injunction against an officer of the Crown, namely, the Commissioner of Crown Lands restraining him from selling land claimed to be subject to Maori native title pending adjudication of the claim. Lord Davey said:

> Their Lordships think that the learned judges have misapprehended the true object and scope of the action, and that the fallacy of their judgment is to treat the respondent as if he were the Crown, or acting under the authority of the Crown for the purpose of this action. The object of the action is to restrain the respondent from infringing the appellant's rights by selling property on which he alleges an interest in assumed pursuance of a statutory authority, the conditions of which, it is alleged, have not been complied with. The respondent's authority to sell on behalf of the Crown is derived solely from the statutes, and is confined within the four corners of the statutes. The

> Governor, in notifying that the lands were rural land open for sale, was acting, and stated himself to be acting, in pursuance of the 136th section of the Land Act, 1892, and the respondent in his notice of sale purports to sell in terms of s. 137 of the same Act. If the land were not within the powers of those sections, as is alleged by the appellant, the respondent had no power to sell the lands, and his threat to do so was an unauthorized invasion of the appellant's alleged rights.

The effect of this passage is that an aggrieved person may sue an officer of the Crown to restrain a threatened act purportedly done pursuant to a statute.

We now turn to consider the position after 1948. It is axiomatic that the Crown Proceedings Act 1948 was passed to improve the position of the citizen vis a vis his or her rights against the Crown. As Professor Wade in his article *"Injunctive Relief against the Crown and Ministers"* (1991) 107 LQR 4, at 6 says:

> The Crown Proceedings Act 1948 was a remedial statute, designed to put the Crown, so far as it could properly be done, into the position of an ordinary litigant, so that justice could be done without obstruction by the Crown's ancient immunities. As Lord Jauncey said in *British Medical Association v. Greater Glasgow Health Board* [19891 AC 1211 (where, incidentally, *Lord Diplock's Town Investments [Town Investments Limited v. Department of the Environment* [1978] AC 359] dicta were once again disregarded), 'the general purpose of the Crown Proceedings Act was to make it easier rather than more difficult for a subject to sue the Crown,' and the extension of immunities would 'run wholly counter to its spirit.'

Despite the fact that the 1947 Act was remedial in nature, it received a restrictive interpretation in *Merricks v. Heathcoat-Amory* [1955] Ch 567. In that case Upjohn J held that s. 21 of the United Kingdom Act absolutely prohibited a court from granting an injunction against a Minister who was acting in his capacity as an officer representing the Crown. The facts of that case were as follows.

The plaintiff sought a mandatory injunction against the Minister of Agriculture, Fisheries and Food requiring him to withdraw the draft of a statutory scheme regulating the marketing of potatoes which had been laid by him before Parliament. The action was brought against the defendant both in his personal capacity and in his capacity as minister, a corporation sole constituted by statute. The most important feature of *Merricks v. Heathcoat-Amory* is that it was a private law action. Accordingly, the plaintiff there was not entitled to seek any relief, including injunctive relief unless he could show that he was

seeking to enforce some legal or equitable right to which he was entitled. Therefore he lacked locus standi to bring the action. What in fact Upjohn J, held was that the minister "from start to finish ... was acting in his capacity as an officer representing the Crown". He then went on to decide the case on the erroneous concession of counsel that no injunction could be obtained against the Minister in his official capacity. It was on the basis of this erroneous concession that the application for an injunction was dismissed in limine. We say that the concession of counsel in that case was erroneous on the authority of such cases as *Rankin v. Huskisson* and *Tamaki v. Baker*.

Despite its indefensibility in the light of the decision in *Tamaki v. Baker* the narrow view taken in *Merricks v. Heathcoat-Amory* held the field until 1994. However, the House of Lords in *M v. Home Office* [1994] 1 AC 377 departed from *Merricks v. Heathcoat-Amory* and held – and here we quote from the headnote of the case – that:

> [I]njunctions, including interlocutory injunctions, could be granted and that section 21 of the Act of 1947 did not prevent an injunction being granted in a situation in which it could have been granted prior to the Act.

It is clear from the speeches in *M v. Home Office* that if the facts of *Merricks v. Heathcoat-Amory* were to recur today, an injunction would be available against the defendant Minister of the Agriculture provided that it was brought as a public law action. We may also mention in passing that in *Government of Malaysia v. Lim Kit Siang* the action failed because the majority of the Supreme Court classified it as a private law action because of the limited range of remedies available under RHC O. 53 as it then stood. If such a plaintiff as in that case were to bring a similar action today, we have no doubt that he would be accorded *locus standi* in view of O. 53 as it presently stands.

In Canada, s. 16(2) and (4) of the Proceedings against the Crown Act 1989, is in *pari materia* with proviso (a) to our s. 29(1) and s. 29(2) respectively. They provide as follows:

> (2) Where, in proceedings against the Crown, any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but may, in lieu thereof, make an order declaratory of the rights of the parties.

(4) The court shall not in any proceedings grant an injunction or make an order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown that could not have been obtained in proceedings against the Crown, but may, in lieu thereof, make an order declaratory of the rights of the parties.

The Court of Appeal of *Nova Scotia in Smith v. Attorney General of Nova Scotia* [2004] NSCA 106, considered the effect of these provisions and held that s. 16(4) of the Canadian statute (s. 29(2) of the 1956 Act) did not prevent interim injunctions being granted against officers of the Crown. Cromwell JA (Freeman and Roscoe JJA concurring) in a judgment delivered on 15 September 2004, said:

I conclude that the ordinary sense of the words of s. 16(4), read in the context of the pre-existing law and the scheme and purpose of the Act leads to two conclusions: first, that in drafting the section, the Legislature assumed that injunctions against Crown officers were available in some circumstances; and, second, that the intention was not to prohibit such injunctions in all circumstances.

In a later passage the learned judge said that in his opinion:

the better view is that provisions such as s. 16(4) are declaratory of the common law and, therefore, did not introduce any new restrictions on the availability of injunctions against Crown servants. I say this for two reasons. First, it seems to me to be the better interpretation of the statute read in its full context. Second, this view has the recent support of the House of Lords (effectively overruling much of the earlier English authority to the contrary to which I have referred to in the preceding paragraph), the more recent scholarly writing, and the weight of the admittedly scant Canadian judicial authority: see for example *In re M.* [1994] 1 AC 377 (HL (E.))

Our attention was also drawn by learned counsel for the appellant to *Saonah bt Bedul v. Pentadbir Tanah dan Daerah Melaka Tengah* [1994] 4 CLJ 584 where Mohd Noor J held (obiter) that an interim injunction could be issued against the defendant Land Administrator in that case or an officer of the Government by reason of s. 29(2) of the Government Proceedings Act 1956 read together with ss. 50, 51 and 54(d) of the Specific Relief Act 1950. We entirely agree with and endorse the views of the learned judge in that case. In our judgment, the effect of current authority is that our courts have jurisdiction to grant interim and permanent injunctions against any servant of the Government. Accordingly, there was no jurisdictional bar to the High court

granting the instant appellant the injunction it sought against the 1st respondent, the Director of the hospital in question. Since a Government servant or a member of the Cabinet may be restrained by injunction, it is strictly unnecessary from a practical point of view to decide whether the Government itself may be restrained in appropriate circumstances. Nevertheless, since the question is one which was argued before and ruled upon by the learned judicial commissioner, we think it behoves us to deal with the point. We accordingly proceed to consider the position of the 2nd and 3rd respondents, namely, the Ministry of Health and the Government of Malaysia.

It has been settled since at least 1978 that s. 29 of the 1956 Act does not prohibit the grant of temporary injunctions against the Government. In *Tengku Haji Jaafar & Anor v. Government of the State of Pahang* [1978] 2 MLJ 105 it was held that the section "does not take away therefore the right of the court to grant an interlocutory injunction". This court in *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 CLJ 378 treated the ratio in *Tengku Haji Jaafar & Anor v. Government of the State of Pahang* as settled law. Although the Federal Court reversed our decision in that case on the constitutional point, our judgment on this point was approved sub silentio. Accordingly, it is too late in the day to argue that s. 29 bars the grant of an interlocutory or even an interim injunction against the Government.

That brings us to the second issue, namely, whether an injunction should be granted on the merits of the case before us. Of course, the usual practice of this court once we find that the court below has wrongly rejected an application on jurisdictional grounds is to remit the case to the judge to decide the case on merits. But this is not an ordinary case. Here all the material relevant to the exercise of discretion was before us and the matter is, as we have already said, one of urgency. We therefore considered this to be an appropriate case for us to decide whether the merits justify the grant of the injunction sought. In our view they do not.

This is a case of a pure breach of contract. Learned counsel for the appellant cited a number of recent cases where equitable estoppel has been elevated to the status of a constructive trust because of some unconscionable behaviour on the part of the representee. The cases include *Yaxley v. Gotts* [2000] 1 All ER 711, *Gillette v. Holt* [2000] 2 All ER 289. We may add that useful reference may also be made to *Birmingham Midshire Mortgage Services v. Sabherwal* 80 P & CR 256 where Robert Walker LJ (now Lord Walker) said that in certain situations, for example, a family arrangement, "the concepts of

trust and equitable estoppel are almost interchangeable". Relying on this line of authority counsel argues that there subsists a constructive trust in his client's favour because (i) the respondents made a representation that the canteen contract would be renewed; (ii) the appellant, encouraged by the representation and acting upon it, expended money in refurbishing the premises in question, employing additional staff and purchasing new equipment; (iii) the conduct of the respondents in reneging on their promise and awarding the canteen contract to the 4th respondent is unconscionable.

Now, if you look at the cases relied on by counsel, you will find that the court in each case imposed a constructive trust to protect a litigant's interest in immovable property. Here, the appellant has no interest whatsoever in the immovable property in which the canteen is situated. All that the appellant has is a purely contractual right to run the canteen at the respondents' premises: nothing more. And if the appellant establishes a breach of contract at the trial of the action then he will be entitled to an award of damages in the ordinary way. So, all that the appellant complains about is readily compensated by a monetary award. Since monetary compensation is an adequate remedy, it follows that in accordance with well settled principles governing equitable discretion, specific relief is inappropriate in the circumstances of this case.

Before we conclude there is one matter requiring comment. When writing this judgment, we came across the case of *Muniandy v. Majlis Perbandaran Langkawi* [2003] 4 CLJ 123 where the High Court purported to follow Salleh Abas LP's view in *Government of Malaysia v. Lim Kit Siang* while rejecting the judgment of so distinguished a judge as Edgar Joseph Jr J in *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 affirmed by this court in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293 which is a decision the High Court also refused to abide by. We may say at once that the High Court's purported acceptance of Salleh Abas LP's view in *Government of Malaysia v. Lim Kit Siang* was done without any proper appreciation or evaluation of the jurisprudential worth of that view. With great respect to the learned judicial commissioner in *Muniandy v. Majlis Perbandaran Langkawi*, it was not open to him to refuse to follow a decision of this court. We reiterate that it is for the High Court to abide by

a our judgments and those of the Federal Court and not to set these aside as if they were some sort of casual, friendly or social advice that may or may not be followed. And we trust that no further reminder of this nature will be necessary in future.

b For the reasons already given, the appeal was dismissed and those orders made that are usually consequent upon a dismissal.

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